No. 83-1929

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In the Supreme Court of the United States

OCTOBER TERM, 1984

JAMES GREGORY SMITH AND ROBERT SHINGLE SPEIR,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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Petitioners contend that a large quantity of marijuana seized from petitioners' aircraft at the time of their arrests should have been supressed as the fruit of the monitoring by government agents of an electronic tracking device installed in their aircraft pursuant to a federal court order because (1) the application for the installation order was submitted by a state law enforcement officer, and (2) the affidavit supporting the installation order allegedly failed to establish probable cause.

1. Following a bench trial on stipulated facts in the United States District Court for the Eastern District of Texas, petitioners were convicted of importation of marijuana, in violation of 21 U.S.C. 952(a) and 960, possession of marijuana with intent to distribute it, in violation of 21

U.S.C. 841(a)(1), transportation of a hazardous material (gasoline) in air commerce, in violation of 49 U.S.C. 1472(h), and conspiracy to commit the above offenses, in violation of 18 U.S.C. 371. Petitioners were each sentenced to concurrent terms of five years' imprisonment on each count to be followed by a two-year special parole term. The court of appeals affirmed (Pet. App. A1).

The record in this case shows that on May 17, 1982, Terry Lankford, a Texas narcotics investigator working with United States Customs officers, applied before a federal magistrate in the Eastern District of Texas for a court order authorizing the installation of an electronic tracking device, or transponder, in an aircraft jointly leased by petitioners (Pet. App. C4, E1-E8). In his affidavit in support of the order, Lankford stated that petitioner Smith was the subject of a separate state narcotics investigation and was known to Lankford as a narcotics smuggler who used aircraft in his smuggling operation (*id.* at E4-E5). The affidavit further stated that Smith owned another aircraft and was using a fictitious company as a front for his operations — a common practice among narcotics smugglers (*id.* at E5-E6). In addition, Smith had filed a false flight plan on May 16, 1982, giving a destination in Texas; shortly thereafter, Smith's companion had been heard checking weather conditions for a flight over international waters to the Virgin Islands (*id.* at E6-E7). Lankford also had received information that Smith's plane had been stripped of its passenger seats, apparently to make room for the contraband, and that an additional fuel tank with a capacity of 200 gallons had been installed in the aircraft to increase its range (*id.* at E3-E4).

On the basis of this information a federal magistrate issued an order authorizing the installation of a tracking device inside petitioners' aircraft (Pet. App. E9-E10). After installation, Customs officers used the transponder to track

the aircraft, which, when seized after its return to this country on May 18, 1982, was found to contain more than 900 pounds of marijuana (Pet. App. C3-C4).

2. Petitioners claim that the marijuana seized from their aircraft should have been suppressed as the fruit of an allegedly invalid order authorizing the installation of the transponder in their aircraft. This claim is without merit for a number of reasons.

To begin with, we note that petitioners' invocation of the exclusionary rule in the circumstances of this case would appear to be foreclosed by this Court's recent decision in *United States* v. *Leon,* No. 82-1771 (July 5, 1984), establishing an exception to the exclusionary rule where the police have reasonably relied on a warrant issued by a detached and neutral magistrate but later found to be defective. Even if there were merit to petitioners' complaints regarding the installation order (and, as we show below, there is none), it is clear that the law enforcement officers in this case acted in objective good faith in seeking the order and in relying on the magistrate's determination of probable cause. Thus, application of the exclusionary rule is inappropriate in this case.

Beyond this, as the Court's recent decisions make clear, the marijuana is not a suppressible fruit of any defect in the installation order. Even if the order were invalid, the evidence was not the fruit of any illegality associated with the installation of the beeper. A warrant was required only because the officers entered the aircraft to install the transponder, but petitioners do not seek suppression of any evidence discovered during that entry. Compare *Segura* v. *United States,* No. 82-5298 (July 5, 1984). The mere act of installing the transponder, without more, did not infringe any of petitioners' Fourth Amendment interests. See *United States* v. *Karo,* No. 83-850 (July 3, 1984), slip op.

5-7. Thus, there can be no dispute that it was the monitoring of the transponder by Customs officers to trace the public movements of the aircraft that resulted in the seizure of the marijuana that petitioners seek to suppress. But, as this Court held in *United States* v. *Knotts*, 460 U.S. 276 (1983), and reiterated in *Karo*, the monitoring of a tracking device to trace the public movements of a conveyance is not a search or seizure within the meaning of the Fourth Amendment. Because the marijuana is the fruit of the lawful monitoring and not of any leads gained while the officers were inside the aircraft, petitioners may not seek suppression on the basis of any defect in the installation order.

3. In any event, petitioners' contentions do not warrant review on their merits.

a. Petitioners contend (Pet. 6) that the installation order did not comply with Rule 41(a) of the Federal Rules of Criminal Procedure because the order was issued upon the application of Lankford, a state police officer, rather than "upon request of a federal law enforcement officer or an attorney for the government." Nothing in the installation order, however, suggests that it was issued pursuant to Rule 41, and petitioners cite no support for the proposition that installation orders for electronic tracking devices may be authorized only in conformity with the requirements of that rule.[1] We believe that the issuance of an installation order would be authorized under the All Writs Act, 28 U.S.C. 1651, and under the inherent power of the courts to issue warrants in circumstances conforming to the Fourth Amendment.

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[1]We note that petitioners did not raise this contention in the district court and thus, although they presented the issue in the court of appeals, appear to have failed to preserve the issue for review. See *United States* v. *Jackson*, 700 F.2d 181, 190 (5th Cir. 1983), cert. denied, No. 82-6963 (Oct. 3, 1983); *United States* v. *Davis*, 656 F.2d 153, 155 (5th Cir.), cert. denied, 456 U.S. 930 (1981).

Moreover, petitioners have failed to demonstrate any prejudice from the alleged noncompliance with Rule 41. This Court has noted that suppression is not invariably required for every insubstantial statutory violation, even where the statute does include an exclusionary remedy. See *United States* v. *Donovan*, 429 U.S. 413, 432-434 (1977); *United States* v. *Chavez*, 416 U.S. 562, 574-575 (1974); *United States* v. *Giordano*, 416 U.S. 505, 527 (1974). As the Second Circuit remarked, in determining whether inconsequential violations of Fed. R. Crim. P. 41(c) called for suppression, "courts should be wary in extending the exclusionary rule in search and seizure cases to violations which are not of constitutional magnitude." *United States* v. *Burke*, 517 F.2d 377, 386 (1975) (footnote omitted). The court in *Burke* concluded that evidence should not be suppressed unless the defendant was "prejudiced" by the infraction in the sense that the search would not otherwise have occurred or would not have been so abrasive if the rule had been followed, or where there is evidence of an "intentional and deliberate disregard" of the rule (*id.* at 386-387).[2] None of those factors is present here.

b. Petitioners also argue (Pet. 6-16) that Officer Lankford's affidavit failed to establish probable cause to support the issuance of the installation order. This claim is without merit.[3]

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[2]The *Burke* test has been adopted by most of the other circuits. See, *e.g.*, *United States* v. *Marx*, 635 F.2d 436, 441 (5th Cir. 1981); *United States* v. *Searp*, 586 F.2d 1117, 1124-1125 (6th Cir. 1978), cert. denied, 440 U.S. 921 (1979); *United States* v. *Mendel*, 578 F.2d 668, 673 (7th Cir.), cert. denied, 439 U.S. 964 (1978); *United States* v. *Gitcho*, 601 F.2d 369, 372 (8th Cir.), cert. denied, 444 U.S. 871 (1979); *United States* v. *Vasser*, 648 F.2d 507, 510-511 (9th Cir. 1980), cert. denied, 450 U.S. 928 (1981); *United States* v. *Pennington*, 635 F.2d 1387, 1389-1390 (10th Cir. 1980), cert. denied, 451 U.S. 938 (1981).

[3]We note that petitioners' reliance (Pet. 15) on *United States* v. *Butts*, 710 F.2d 1139 (5th Cir. 1983), is misplaced. The panel opinion in

The affidavit supporting the installation order was based upon Officer Lankford's knowledge of petitioner Smith's prior involvement in narcotics activities, including Smith's use of a front to conceal those activities; on Smith's filing a false flight plan while his companion checked the weather conditions for a flight outside the United States; and on information that the passenger seats had been removed from Smith's airplane and that an additional fuel tank had been installed. The affidavit thus provided probable cause to believe that the aircraft was about to be used for a smuggling operation.

To the extent that Lankford relied upon another source for information about the condition of the interior of the aircraft, it is apparent that Lankford's informant was a citizen, or eye-witness, informant working at the Corpus Christi International Airport (see Pet. App. E3-E4). Such citizen-informants are presumptively reliable and their information need not be corroborated to the same extent, if at all, as that from a professional, or criminal, informant. See, *e.g.*, *United States* v. *Fooladi*, 703 F.2d 180, 182-183 (5th Cir. 1983); *United States* v. *Melvin*, 596 F.2d 492, 496-497 (1st Cir.), cert. denied, 444 U.S. 837 (1979); 1 W. LaFave, *Search and Seizure* § 3.4(a), at 592 (1978). Here, the information from the citizen-informant that the seats had been removed from the aircraft and an extra fuel tank installed suggested that Smith may have been involved in a smuggling venture. That information, coupled with the information that Smith was a known smuggler who had filed a false flight plan and whose companion had inquired about weather conditions for an overseas flight, provided probable cause to justify entry into the aircraft to install the transponder.

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that case was vacated and subsequently overruled by the en banc Fifth Circuit. *United States* v. *Butts*, 729 F.2d 1514 (1984), petition for cert. pending, No. 84-111.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

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